INDIA -- MEASURES AFFECTING THE AUTOMOTIVE SECTOR
(WT/DS146-175)

OPENING STATEMENT OF THE UNITED STATES

FIRST PANEL MEETING

March 21, 2001

Mr. Chairman, Members of the Panel,

1. On behalf of the United States, we would like to begin by thanking the Panel and the Secretariat staff for taking on this task. Our delegation looks forward to working with you, and with the delegations of India and the European Communities, as you carry out your work.

Introduction

2. This afternoon we would first like to highlight the arguments and factual evidence that the United States has presented in this case. We then have a few remarks on the Indian written submission. However, since we have not yet heard what the Indian delegation will say today, much of our rebuttal to the Indian position will necessarily take place in our second written submission.

3. The United States has presented and documented the facts necessary to show that India is imposing local content and trade balancing requirements that are inconsistent with Articles III:4 and XI:1 of the GATT 1994, and Article 2 of the Agreement on Trade-Related Investment Measures. As we explained in our submission, India's Public Notice No. 60, and the memoranda of understanding that India signs with companies

manufacturing passenger cars in India, discriminate against foreign goods. In addition, those measures bar the products of other countries from entering India. Furthermore, India has confirmed that it plans to maintain these requirements in place for the foreseeable future.

4. In return, India has only barely addressed the legal case that we developed. India has instead dedicated most of its submission to re-characterizing our complaint. However, contrary to what India asserts, this dispute is not about India's import licensing regime for SKD and CKD kits, and it is not a reprise of a previous case. In fact, India is simply trying to have something two ways: at first, India asserts that an entirely new set of measures will come into place on April 1 -- and in practically the very next moment India tells us that it intends to continue enforcing the same obligations that have been in place all along. It appears that India hopes to divert the attention of the Panel from what is really at issue.

I. The United States' Arguments

5. In light of the many divergences between the U.S. and Indian submissions, it will be useful to review the U.S. position in this dispute. Let me begin by stating clearly what is actually at issue in this case.

6. In this dispute we are challenging two requirements that India imposes on manufacturers of passenger cars. First, we challenge the so-called "indigenisation" requirement. This requirement obligates manufacturers who sign an MOU with the Indian Government to use increasing percentages of Indian content in their production.

By the end of the third year, a manufacturer must incorporate at least 50% local content in its production; by the end of the fifth year, it must incorporate into its production at least 70% local content. As we explained in our submission, the indigenisation requirement plainly discriminates against imported automotive parts and components by preventing them from constituting more than 50% (at first) or more than 30% (in later years) of an automobile manufactured in India.

7. It bears emphasizing that the indigenisation requirement discriminates against automotive parts and components of *any* kind -- not just against SKD and CKD kits. It discriminates against imported items as small as nuts, bolts, and screws. It also discriminates against imported items as large as assemblies and subassemblies. Any imported part or component, no matter how small or large, and no matter how separate from other parts and components, counts against a manufacturer that is trying to meet the mandatory local content percentage.

8. We also challenge a second requirement, which we have called the "trade balancing" or "export balancing" requirement. This requirement imposes additional burdens on every imported SKD and CKD kit, but not on like domestic kits. Manufacturers who purchase or use imported SKD and CKD kits incur an obligation to export from India an equal value of automobiles or automotive parts. In contrast, a manufacturer who buys or uses domestic kits is under no such obligation. In other words, the less a manufacturer uses imported kits, the more freedom it has to decide how much of its production to allocate between the export and the domestic markets -- and when to export.

9. Our submission has fully documented the nature and extent of these two requirements. India imposes them on car manufacturers generally by means of Public Notice No. 60, which India adopted on December 12, 1997. India says that Public Notice No. 60 will be withdrawn on April 1, but for the moment Public Notice No. 60 is still in place.

10. But India also imposes these requirements on individual car manufacturers through the MOU's that those manufacturers have signed. In its written submission, India has confirmed that the MOU's will continue to be enforceable after April 1, and thus India has also confirmed that the MOU's are measures independent of Public Notice No. 60. Finally, these requirements are also imposed on manufacturers and enforced against them through the provisions of the Foreign Trade (Development and Regulation) Act, the Exim Policy, and various associated legal provisions. We have detailed all of this in our written submission, and we have provided copies of the relevant documentation.

11. Our submission has also fully described the legal basis for our complaint.

12. Our first claim arises under GATT Article III:4, which Public Notice No. 60 and the MOU's plainly contravene. The indigenisation and trade balancing requirements accord less favorable treatment to imported auto parts and components than to domestic auto parts and components. They do so in two ways: First, manufacturers can meet the indigenisation obligation only by using Indian parts and components instead of imported ones in their production of motor vehicles. Second, manufacturers who purchase or use imported SKD or CKD kits bear the additional burden of the export balancing requirement. A manufacturer that uses an imported kit loses control over its marketing

choices for its finished products: on the one hand, the manufacturer can export the cars built from imported kits, in which case of course those goods do not compete at all in the domestic market. If, instead, the manufacturer wants to sell those cars in the domestic market, the manufacturer must export an equivalent value of automobiles or automotive parts -- with all the associated costs and disruptions incurred in that mandated export. In either case, the requirement skews the conditions of competition against the imported kits. And of course, a manufacturer can avoid these burdens only by purchasing and using Indian-origin kits rather than imported ones -- which is yet another form of discrimination against imported goods. For all these reasons, the Indian measures are inconsistent with Article III:4.

13. Our second claim arises under GATT Article XI:1. The Indian measures plainly contravene this obligation as well. First, the trade balancing requirement limits any car manufacturer's imports of SKD or CKD kits to an amount that is correlated to the manufacturer's exports of automobiles and their components. India has been explicit on this point: "CKD/SKD kits imports would be allowed with reference to the extent of export obligation fulfilled in the previous year."[1]

14. Unlike the trade balancing requirement, the indigenisation requirement does not merely restrict the amount of kits that a manufacturer may import into India; it actually prohibits such imports outright. Any manufacturer that fails to achieve the local content targets in the MOU is forbidden from importing CKD and SKD kits. As our submission described, India has confirmed that MOU's can be invoked to impose import limitations

[1] *Replies by India to Questions Posed by Japan*, G/TRIMS/W/15, answer to question 24; Exhibit US-5.

on manufacturers.[2] For all these reasons, the MOU's and Public Notice No. 60 are inconsistent with Article XI:1.

15. Our third claim arises under Articles 2.1 and 2.2 of the TRIMs Agreement. That Agreement prohibits trade-related investment measures that are inconsistent with Article III or Article XI of the GATT 1994.

16. There can be no serious dispute that Public Notice No. 60 and the MOU's are "investment measures". As we explained in our submission, these measures require foreign enterprises to bring specified levels of equity into India; they attempt to steer foreign investment towards manufacturing rather than assembly; and they effectively support investment in the Indian auto parts industry. Furthermore, we have already explained this afternoon that these measures are inconsistent with India's trade obligations under Articles III:4 and XI:1 of the GATT. In addition, Public Notice No. 60 and the MOU's come within the terms of paragraphs 1(a), 1(b) and 2(a) of the Illustrative List annexed to the TRIMs Agreement. For all these reasons, these measures are inconsistent with India's obligations under that Agreement.

17. Our claims in this dispute are not novel. The indigenisation requirement is a straightforward local content requirement; and the trade balancing requirement is both discriminatory and a straightforward quantitative restriction on imports. Such measures have been understood to be inconsistent with GATT and WTO obligations for many years. The report of the *FIRA* panel, which was perhaps the first GATT panel to address

[2] First Submission of the United States, para. 31, citing India's Answers to Questions by the United States, 13 July 2000, answer to question 5, Exhibit US-11.

these kinds of contractual requirements, dates back to 1984. The *EEC - Parts and Components* panel, which examined similar issues, issued its report in 1990. And, by adopting the TRIMs Agreement as a part of the results of the Uruguay Round, WTO Members committed themselves explicitly to eliminating such measures. It is therefore particularly unfortunate that India chose to introduce Public Notice No. 60 and the MOU's in late 1997 -- practically three years after the Uruguay Round agreements entered into force. It is all the more unfortunate that in the spring of 2001 India is telling the world that it intends to maintain these requirements in place and enforce them.

II. The Indian Submission

18. We would now like to turn our attention to India's First Written Submission.

A. Some Elements of Common Ground

19. Earlier in this statement, we noted that there are wide divergences between India's written submission and ours. Fortunately, however, there is some common ground between the parties. For example, India's submission essentially confirms our descriptions of the indigenisation and export balancing obligations that are imposed by the MOU's.[3] Moreover, India's submission has confirmed that India will continue to require MOU signatories to perform the obligations of the MOU after April 1, 2001.[4] In

[3] Para. 5.
[4] Para. 12.

addition, India has confirmed that the MOU's are "binding" and will be enforced through Indian courts under provisions of Indian civil law.[5]

B. The Matter at Issue

20. We quickly part company with India, however, on the legal analysis applicable to this dispute. Much of our disagreement arises out of India's attempt to re-define what this dispute is actually about. Because India's re-characterization of our complaint constitutes a good portion of its argumentation, we will address that issue first, before taking up some of India's more specific points.

21. In paragraph 2 of its submission, India says that our complaint "concerns the application of India's discretionary licensing system". India then goes on to argue that its licensing regime is beyond the reach of this Panel's jurisdiction, because we have already completed a dispute on that regime. But given what we have already said today, it should be clear that India has completely misconstrued the nature of our complaint. The measures at issue are not India's import licensing system; instead, the measures that we challenge are the indigenisation and trade balancing requirements of Public Notice No. 60 and the MOU's. We have been clear since the beginning of this dispute that those are the measures we challenge. India cannot avoid our complaint by defending measures that are not the subject of the case.

22. Furthermore, India's argumentation mixes up two quite separate concepts. On the one hand, India's licensing regime acts as a total ban on imports. So-called "restricted"

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[5] Para. 14.

items ordinarily cannot be imported at all. That was the basis of the United States' complaint in the *India-QR's* dispute. The present dispute, on the other hand, does not contest that import ban; instead, this dispute challenges the conditions that India attaches to goods imported despite the ban. Simply put, the *India-QR's* dispute was about India's efforts to keep goods out of India. This dispute is about what India does when goods actually get in.

23. For example, we have already discussed how the indigenisation requirement damages the competitive position of *all* automotive parts and components imported into India. That point alone should by itself put to rest India's assertion that this dispute concerns its import licenses. After all, India licenses the import of *kits*; the discrimination at issue in this dispute affects *all automotive parts and components*. Public Notice No. 60 and the MOU's are harming the export interests of all car part manufacturers around the world -- not just the interests of manufacturers of the SKD and CKD kits to which India's import licensing regime applies.

24. In a sense, this dispute is a logical successor to the *India-QR's* case. After finally achieving access for their products into India by peeling away the import ban that India has been applying through its licensing regime, WTO Members are naturally concerned about the treatment their products will receive after importation -- hence their desire to ensure national treatment for those products. And, Members are concerned about the durability of that access. They therefore want to ensure that India does not impede that access through an entirely new layer of barriers -- such as, in this case, the independent import restrictions and prohibitions contained in Public Notice No. 60 and the MOU's.

25. Of course, India's import licenses for SKD and CKD kits do play a role in this dispute. In the context of this case, those licenses are, first and foremost, an "advantage" given to MOU signatories, as that term was used in the *EEC-Parts and Components* report. Companies willing to sign an MOU obtained an advantage not given to others -- namely, the right to import SKD and CKD kits despite their "restricted" status. However, just as in the *Parts and Components* dispute, and in the *FIRA* dispute before it, it is not the "advantage" that is the subject of the complaint, but rather the conditions attached to the "advantage". In *FIRA*, for example, the "advantage" was authorization to invest -- which, as India points out, was at the time not a subject of GATT disciplines at all. But that advantage was conditioned on local purchase undertakings, which in turn were examined by the *FIRA* panel and were found to be contrary to GATT's national treatment disciplines. This case is no different: it is not the "advantage" -- the import licenses -- that this panel needs to examine, but rather the conditions attached to those licenses. Those conditions include undertakings by MOU signatories to comply with indigenisation and trade balancing requirements, and for the reasons already given, those conditions are inconsistent with India's WTO obligations. India's confusion about the role that import licenses play in this case should not deter the Panel from that conclusion.

26. Unfortunately, these misunderstandings pervade India's argumentation. For example, in paragraphs 38 to 44 and again in paragraph 49, India argues that the measures at issue in this case have already been the subject of a ruling by the Dispute Settlement Body, and for that reason cannot be examined by this Panel. The premise for this argument, of course, is that the measures at issue in this case are India's import licenses, and as we have just seen, that premise is incorrect. It is also worth pointing out that the

terms of reference of the *India-QR's* panel were established on November 18, 1997.[6] Public Notice No. 60, on the other hand, was issued on December 12, 1997. Therefore, even under India's logic, these measures could not have been a part of the *India-QR's* dispute.

27. The same faulty premise also underlies the argument that India makes at paragraphs 45 to 49 -- that the United States is simply seeking to add further legal grounds with respect to a previous successful challenge. We are doing nothing of the sort; we are instead challenging an entirely separate set of discriminatory and trade-distorting requirements.

28. The argument that India makes at paragraphs 17 to 26 -- namely, that the United States is challenging measures that India will take in the future -- is based in part on the same flawed premise. First, the United States is actually challenging measures that India has already taken -- namely, the imposition of local content and trade balancing obligations on MOU signatories. And, while India says that import licensing will end on April 1, even India's written submission acknowledges that nothing about the MOU's will change after that date: they remain "binding" and "will, if necessary, be enforced".[7] These measures are no different from the binding and enforceable purchase undertakings that the *FIRA* panel found inconsistent with the GATT.

[6] Report of the Panel in *India-QR's*, WT/DS90/R, adopted 22 September 1999, para. 1.2.
[7] Para. 14.

C. India's WTO Obligations

29. We have already addressed a large part of India's written submission, because the bulk of it is based on India's attempted re-characterization of the dispute. However, India's written submission also makes a handful of points directed at the merits of our claims, and we would now like to turn to those issues.

30. In paragraphs 12 and 13, India contends that it can require MOU signatories to continue to perform the obligations of the MOU consistently with India's WTO obligations. We disagree.

31. In paragraph 12(b), India ventures a very brief defense of the export balancing requirement and argues that it is consistent with GATT Article XI and the TRIMs Agreement. Unfortunately, India has failed to address the points we actually made about the trade balancing requirement. For one thing, we have explained that the trade balancing requirement is also inconsistent with India's commitment to accord national treatment to imported goods -- and that is a claim that arises under Article III of the GATT, not Article XI. And to the extent the trade balancing requirement violates GATT Article III, it violates Article 2 of the TRIMs Agreement as well.

32. Furthermore, we cannot agree with India's rather cramped interpretation of GATT Article XI and the TRIMs Agreement. To be sure, India acknowledges that GATT Article XI and paragraph 2(a) of the TRIMs Agreement Illustrative List apply to export balancing requirements. But India then inexplicably says that they apply only to export requirements "imposed as a condition for the grant of an import license". As written,

however, Paragraph 2(a) relates to export requirements tied to *any* form of import restriction -- not just import licenses. And, as we have already discussed, the MOU's themselves provide for a restriction on imports by signatories.

33. India turns to the indigenisation requirement in paragraph 13 of its submission, but does not actually attempt to defend it. India just says that car manufacturers may already be in compliance with it. If so, why is India continuing to insist that it needs to be able to enforce the requirement in its courts after April 1st? Would such compliance mean anything other than that manufacturers are reluctant to test India's willingness to enforce the requirement? India also does not tell us what will happen to a manufacturer that slips below the required percentage in the future.

34. In any case, compliance by manufacturers with a WTO-inconsistent measure does not transform that measure into one that is compatible with India's WTO obligations. As India is well aware, GATT Articles III and XI protect conditions of competition, not trade flows; no demonstration of trade effects is necessary to establish a breach of those obligations.

35. In paragraph 46 of its submission, India states that the MOU's are not "laws, regulations, and requirements" or "measures" and therefore, according to India, the GATT and the TRIMs Agreement do not apply. India does not explain its reasoning or cite any authority for this startling assertion. In short, India is simply mistaken. The *FIRA* panel report was clear on this question: contractual commitments of the kind considered here -- namely, binding and enforceable commitments in a contractual undertaking to the government -- are at the very least "requirements". The *Parts and*

Components panel reached the same conclusion. And, as the European Communities has correctly pointed out in its written submission, the term "measures" is at least as broad as the term "requirements". This Panel should not be moved by India's long-discredited argument.

36. We would now like to turn briefly to India's mention of the balance-of-payments provisions of the GATT 1994. Nowhere does India actually say that the indigenisation and trade balancing requirements are justified by those provisions. Instead, India simply says that if the Panel attempts to examine the U.S. complaint, the Panel will be obliged to embark on the complicated task of re-examining India's balance-of-payments situation. The Panel should not let itself be distracted by India's suggestion, because the balance-of-payments provisions of the WTO Agreements provide no defense to the violations at issue in this case.

37. In the first place, India is prohibited from raising those provisions as a defense to our complaint because it has never notified the measures at issue to the Committee on Balance-of-Payments Restrictions and has never asserted a balance-of-payments justification for them. Article XVIII:12(a) of the GATT 1994 and paragraph 6 of the Uruguay Round Understanding on the Balance-of-Payments Provisions of the GATT 1994 make clear that such notification is required. However, India has never brought the indigenisation or trade balancing requirements before the Committee. In the second place, even if these measures had been taken for balance-of-payments reasons (and India's failure to notify them reinforces the fact that they were not), these measures date from late 1997. Pursuant to paragraphs 2 and 3 of the Understanding, even if India had wanted to take new measures for balance-of-payments purposes, India would have been

required to give preference to price-based measures. Public Notice No. 60, however, imposes quantitative restrictions and local content requirements, not tariff surcharges. Third, the balance-of-payments provisions in any case cannot justify a violation of the national treatment obligations of the GATT. Article XVIII:9 makes clear that the balance-of-payments provisions may be used to "control the general level of imports" -- not to deny national treatment to foreign goods. Once a foreign good has been imported, the foreign exchange for that import has been expended; there is no balance-of-payments justification for permitting discrimination against that imported good. For all of these reasons, the Panel should reject India's balance-of-payments arguments.

Conclusion

38. To summarize: the United States has complained about two specific requirements imposed on car manufacturers in India. The United States has presented evidence and argumentation that these measures have been, and still are, in force; that they discriminate against imported auto parts of all kinds; that they restrict or even ban the importation of CKD and SKD kits; and that they are inconsistent with India's WTO obligations. India has not met our presentation on the merits, but has instead attempted to define the problem away by re-defining the issues in the case -- an approach that the Panel should reject. The United States respectfully submits that the Panel should find that India's measures are inconsistent with Articles III:4 and XI:1 of the GATT 1994 and Articles 2.1 and 2.2 of the TRIMs Agreement.

39. Mr. Chairman, Members of the Panel, as recently as 1994, India had only 28 vehicles per 1,000 persons. In the last seven years, however, India has succeeded in

attracting much-needed investment to its auto production sector to try to relieve the transport burden on the Indian population. And, in the budget announced a few weeks ago, India took further steps that Indian consumers will certainly welcome, such as reducing excise taxes on cars across the board and refraining from increasing its tariffs on new cars despite the upcoming removal of quantitative restrictions. The United States welcomes these steps as well. In that context, it is all the more regrettable that India has chosen to retain the measures at issue in this dispute. Improvements for the Indian consumer need not come at the expense of other Members' trade interests. Indeed, these requirements -- by interfering with the commercial choices of the very investors to whom India has now opened its doors -- unfortunately perpetuate distortions, and protection for the Indian auto parts industry, that India's other, more liberal measures have moved away from.

40. This concludes our opening statement. The United States delegation will be pleased to address any questions that you may have. Thank you.